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In the
Supreme Court of the United States
OCTOBER, 1970 TERM

No. 704

ABERDEEN CABLE TV SERVICE, INC., WALTER A. BROWN AND STACY B. BROWN,

Petitioners

vs.

CITY OF ABERDEEN, SOUTH DAKOTA, A MUNICIPAL CORPORATION, J. CLIFTON HUBBARD, AS MAYOR AND MEMBER OF THE CITY COMMISSION OF THE CITY OF ABERDEEN, FRED GEDDES, HALE IRMAN, AL DONAHUE AND BILL COESTER, AS MEMBERS OF THE CITY COMMISSION OF THE CITY OF ABERDEEN, WINFRED KRAFT, AS CITY AUDITOR OF THE CITY OF ABERDEEN, SOUTH DAKOTA TELEVISION, INC. AND TV SIGNAL COMPANY OF ABERDEEN,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA AND THE CIRCUIT COURT IN AND FOR BROWN COUNTY, FIFTH JUDICIAL CIRCUIT, SOUTH DAKOTA

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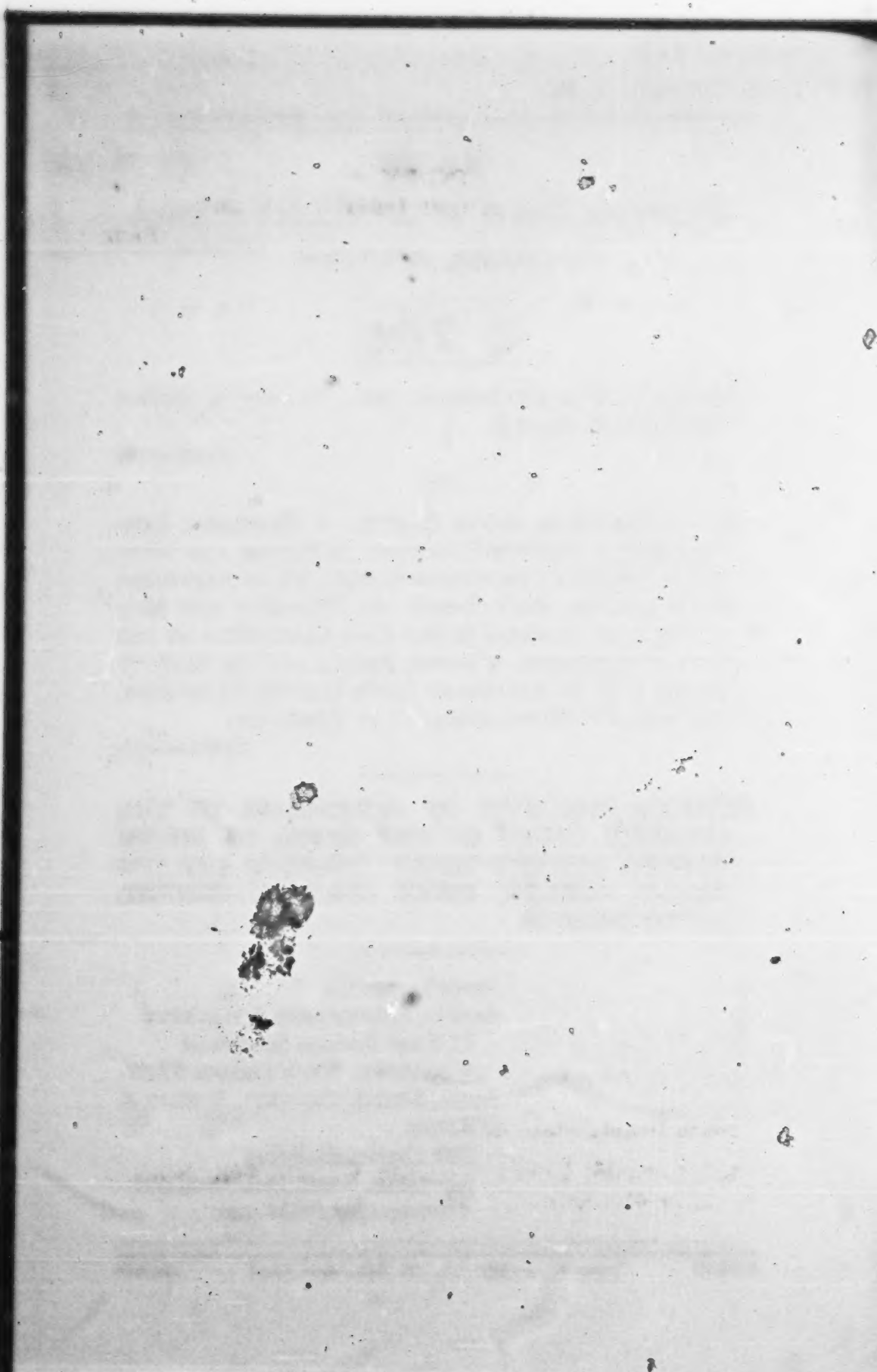

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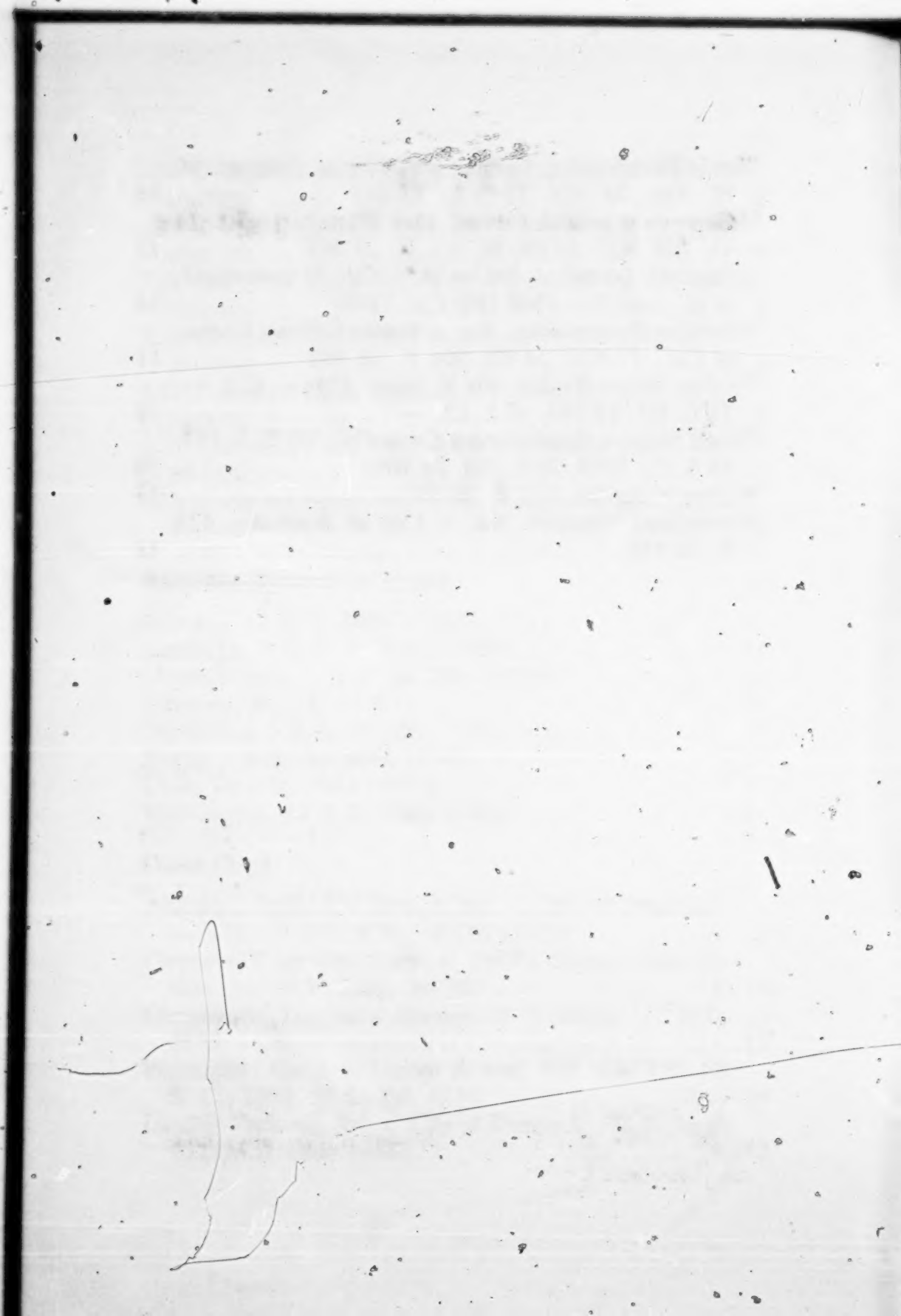

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No. ———

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Petitioners

vs.

CITY OF ABERDEEN, SOUTH DAKOTA, A MUNICIPAL CORPORATION, J. CLIFTON HUBLBERT, AS MAYOR AND MEMBER OF THE CITY COMMISSION OF THE CITY OF ABERDEEN, FRED GIESEN, HALE INMAN, AL DONAHUE AND BILL COESTER, AS MEMBERS OF THE CITY COMMISSION OF THE CITY OF ABERDEEN, WINFRED KNAPP, AS CITY AUDITOR OF THE CITY OF ABERDEEN, SOUTH DAKOTA TELEVISION, INC. AND TV SIGNAL COMPANY OF ABERDEEN,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA AND THE CIRCUIT COURT IN AND FOR BROWN COUNTY, FIFTH JUDICIAL CIRCUIT, SOUTH DAKOTA

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Aberdeen Cable TV Service, Inc., Walter A. Brown and Stacy B. Brown, respectfully shows to this Honorable Court:

(a) This action originated as a declaratory judgment action and a separate election contest (no longer material) and an opinion was rendered by the Honorable Sigurd Anderson, Circuit Judge on February 24, 1969 which is not printed in any official report but a copy thereof is set forth in Appendix 1.

On appeal to the Supreme Court of South Dakota which we limited to the issue whether a CATV was a public utility requiring a public utility election, the issue was decided by the Supreme Court of South Dakota on May 5, 1970 and a copy of the opinion written by the Honorable Charles S. Hanson, Judge of the Supreme Court is found in Appendix 2. The opinion is reported in -- S.D. —, 176 N.W. 2d 738.

(b) A concise statement of the grounds on which the jurisdiction of this Court is invoked is as follows:

(i) The Supreme Court of South Dakota denied rehearing on June 30, 1970, and remitted the case to the Clerk of the Circuit Court in and for Brown County, South Dakota. All that remained by virtue of such decision to be done was to enter judgment in accordance with the opinion of the Court that the cable television system constituted a public utility requiring a public utility election under South Dakota statutes. The remittitur dated June 30, 1970 is the final judgment or decree sought to be reviewed and appears as Appendix 4.

(ii) Rehearing was denied on June 30, 1970 and on that date the remittitur was sent to the lower Court and therefore the time for filing this Petition for Writ of Certiorari is computed from and after June 30, 1970.

(iii) The statutory provision believed to confer on

this Court jurisdiction to review the judgment of the Supreme Court of South Dakota by Writ of Certiorari is Subdivision (3) of Section 1257, Title 28, *U.S.C.A.*

(c) The question presented for review is whether the Supreme Court of South Dakota by its decision violated the rights of the Petitioners under the First (*U.S.C.A.* Amendment 1), Fifth (*U.S.C.A.* Amendment 5, due process of law), and Fourteenth (Section 1) Amendments to the Constitution of the United States in declaring, although no statutory determination had been made by the South Dakota Legislature, that a CATV System is a public utility requiring a public utility election under *SDC* 1939 45.1006, now found in Chapter 9-35 of the *South Dakota Compiled Laws* of 1967. (*SDCL*).

(d) The Constitutional provisions, State statutes and Ordinance of the City of Aberdeen, South Dakota which are involved are as follows:

(i) U.S.C.A. Amendment 1: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; * * *"

(ii) U.S.C.A. Amendment 5 (due process of law): "No person shall * * * be deprived of life, liberty or property, without due process of law * * *."

(iii) U.S.C.A. Amendment 14, Section 1: "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws." (Makes the first Ten Amendments applicable to the States.)

(iv) SDC 1939 §45.0201(78) now found in SDCL 1967 9-35-1: "Street lighting—Utility poles and facilities in public places—Rate regulation—Franchise—Every municipality shall have power to regulate and provide for the lighting of streets, laying of gas pipes, and erection of lamp-posts, electric towers, and apparatus in connection therewith; to regulate the sale and use of gas and electric light and power; to fix and determine the price of gas and electric light and power and the rent of gas and electric meters; to fix and determine the charges for telephones and telephone service connections subject to the powers of the public utilities commission; to regulate or prohibit the erection of poles for telegraph, telephone, or electric wires in the public grounds, streets, or alleys, and the placing of wire thereon, and to require the removal thereof from such places and to require the placing of such wires under ground; and to grant and regulate rights and franchises for such purposes."

(v) SDC 1939 §45.1006 now split into three sections in SDCL 1967 (Chapter 9-35 as follows: 9-35-3: "Grant of franchise subject to approval by voters—The governing body shall grant no franchise to any public utility authorizing it to occupy any of the streets, alleys, or public places of the municipality without submitting the proposition of issuing such franchise to a vote of the electors thereof at a general or special election called for the purpose."

9-35-4: "Adoption of franchise ordinance—Publication and notice of election—Before submitting such proposition the governing body shall first approve the proposed franchise by an ordinance duly adopted and published incorporating the proposed franchise in full and providing for

submission of such proposition at an election to be held not sooner than thirty days after the publication thereof. The notice of election and the proposition so submitted shall refer to such ordinance by number and shall include the full title thereof."

9-35-5: "Majority vote of electors require for franchise—No such franchise or franchise ordinance shall be effective, except as otherwise specifically provided, unless the proposal to grant the same be approved at such election by a majority vote of the electors of such municipality voting thereon."

(vi) SDC 1939 §52.0202 now SDCL 1967 49-3-4 reading as follows: "The Public Utilities Commission shall have general supervision of all common carriers in the state, except street railways."

(vii) SDC 1939 §45.1012 as amended now found in SDCL 1967 9-20-8: "Number of signers required for referendum petition—Data concerning signers—The referendum petition shall be signed by at least five per cent of the legal voters residing in the municipality, such percentage to be based on the whole number of electors voting at the annual municipal election preceding the filing of such petition, and each elector shall add to his signature his place of residence, including his street and house number, if any, and date of signing."

(viii) SDC 1939 §45.1013 now found in SDCL 1967 9-20-9: "Verification of referendum petition. Such referendum petition shall be verified as a petition to initiate a law except that the person verifying the same shall state that he and each of the persons signing the same is a resident and qualified elector of the municipality, naming it."

(ix) Ordinance 1187—Amended adopted by the Aberdeen City Commission on August 12, 1968 granting a franchise or license to Aberdeen Cable TV Service, Inc. is set out in Appendix 3.

(e) The Statement of the Case containing the facts material to the consideration of the question presented is as follows:

Aberdeen Cable TV Service, Inc. is a South Dakota corporation formed to build and operate a CATV system in Aberdeen, South Dakota and Walter A. Brown and Stacy B. Brown are taxpayers and electors of the City of Aberdeen, South Dakota. The intervenor, South Dakota Television Inc., is a South Dakota corporation that formerly owned and operated television station KXAB-TV at Aberdeen, South Dakota. It no longer has an actual real interest in the litigation as it sold and transferred its television station in 1969. The respondent, TV Signal Company of Aberdeen, was allowed to intervene in the Supreme Court of South Dakota when the case was last before the Supreme Court of South Dakota on a motion to recall the remittitur for the purpose of further hearing the case and is the owner of a competing CATV system operating in Aberdeen, South Dakota.

On or about August 12, 1968 the City Commission of the City of Aberdeen, South Dakota adopted ordinance No. 1187—Amended, found in Appendix 3, granting Aberdeen Cable TV Service, Inc. a franchise or license to use the streets and alleys for the purpose of constructing and operating a CATV system. Within 20 days after the final passage of Ordinance No. 1187—Amended, a referendum petition purporting to be signed by the requisite number of Aberdeen electors was filed with the City Auditor of the

City of Aberdeen. Purporting to act upon the petitions calling for the referendum election the city officials took the steps required to call an election and submit the ordinance for rejection or approval. The ordinance at the election was rejected by a vote of 2,532 to 2,026. As set forth in the opinion of Circuit Judge Anderson the petitions calling for the referendum election were so fraudulently circulated and had so many false verifications on the same that the Court declared the election invalid in this declaratory judgment action and that the ordinance remained in full force and effect. The intervenor, South Dakota Television, Inc., the then owner of KXAB-TV, after first attempting to defend the referendum petitions was allowed to amend its answer and allege that the ordinance permitting use of the streets and alleys for a CATV system involved the granting of a franchise to a "public utility" and that the ordinance could not become effective until there had been an affirmative approval of the ordinance at an election called in accordance with the requirements of the statutes dealing with the granting of franchises to public utilities.

The Circuit Court of Brown County (Judge Sigurd Anderson presiding) held that Ordinance 1187-Amended was in full force and effect in spite of the purported election because of the invalidity of the petitions calling for the referendum election and that a CATV system was not a public utility. See Judge Anderson's opinion set out in Appendix 1.

Upon appeal the Supreme Court of South Dakota reversed the decision of the Circuit Court of Brown County and held that a CATV system was a public utility and that since there had been no election held in accordance with the statutes dealing with public utility franchises that the ordi-

nance granting the franchise or license to the petitioner, Aberdeen Cable TV Service, Inc., was void and ineffective. See Judge Hanson's opinion Appendix 2.

Immediately following the decision rendered by the Circuit Court of Brown County, Aberdeen Cable TV Service, Inc. commenced construction of its system and by the time of the rendering of the decision by the Supreme Court of South Dakota it had invested approximately $155,000.00 in its system, all of which was established on the petition for rehearing in the Supreme Court of South Dakota.

Also during the same period TV Signal Company of Aberdeen initiated an ordinance granting to it a franchise or license to use the public streets and alleys for the construction of a CATV system and an election was held thereon not in accordance with the statutes relating to public utility franchises but in accordance with the statute relating to initiated ordinances which specifies a shorter period of time after filing of the petition, in order to hold the election and received a favorable vote and constructed a competing system.

Should the Court grant this petition for Writ of Certiorari, the Writ should be directed both to the Circuit Court in and for Brown County, South Dakota and to the Supreme Court of the State of South Dakota by virtue of the fact that the proceedings after the decision, including the petition for rehearing and the proceedings on a motion to recall the remittitur for further rehearing are on file in the office of the Clerk of the Supreme Court.

Neither the City of Aberdeen or its officers took any part in the trial of this action or on the appeal.

The petitioner Aberdeen Cable TV Service, Inc. has continued to operate its CATV system pursuant to authoriza-

tions of the Federal Communications Commission. Pending the filing of this Petition and the action of this Court thereon, the Supreme Court of South Dakota, acting under its general superintending power, has stayed all proceedings to compel the petitioner Aberdeen Cable TV Service, Inc. to remove its cable and other installations from the streets of the City of Aberdeen, actions for trespass, etc.

(f) Since the Circuit Court of Brown County, South Dakota held that the operation of a CATV system did not involve a public utility the Federal questions were not raised in the Circuit Court but were fully and completely raised for the first time by the Supreme Court of South Dakota itself in its opinion when it said:

> "The question of whether or not a given business, industry or service is a public utility does not depend on legislative definition, but on the nature of the business or service rendered, and an attempt to declare a company or enterprise to be a public utility, where it is inherently not such, is, by virtue of the guaranties of the Federal Constitution, void wherever it interferes with private rights of property or contract. So, a legislature cannot by mere fiat or regulatory order convert a private business or enterprise into a public utility, and the question of whether or not a particular company or service is a public utility is a judicial one."

Thereafter by the petition for rehearing and the affidavit served in connection therewith the issues under the Federal guaranties of the Federal Constitution particularly including the taking of property without due process of law were further asserted.

ARGUMENT

Until the Supreme Court of South Dakota held that a CATV system was in the nature of a public utility, all of the decisions in this country were uniformly to the contrary that a CATV system did not involve a public utility. We refer to this Court's decision in *U.S. vs. Southwestern Cable Co.*, 392 U.S. 157, 88 S. Ct. 1994, 20 L. Ed. 2d 1001 for this Court's discussion of the nature of a CATV system and the determination that a CATV system is not a common carrier. See also *Fortnightly Corp. vs. United Artists*, 392 U.S. 390, 88 S. Ct. 2084, 20 L. Ed. 1176.

In *TV Pix, Inc. vs. Taylor*, 304 F. Supp. 459, a three judge Federal Court was convened to consider the constitutionality of a Nevada statute which placed regulation of CATV systems in the public utility commission of that state. In adopting the law a grandfather clause was included for the benefit of all existing TV systems. The Court held that until Congress or the Federal Communications Commission had pre-empted the particular field of regulation provided for in the Nevada statute that regulation by statute could be continued. This decision was affirmed without opinion by this Court in — U.S. —, 24 L. Ed. 2d 746, 90 S. Ct. —.

Prior to the decision of the Supreme Court of the State of South Dakota there has been no decision where public utilities regulation has been expanded by judicial decision to include CATV. In Connecticut, Nevada, Rhode Island and Vermont legislative enactment has been required to effect this change and in each state, except Connecticut where there was no existing CATV systems as we understand it, each statute has included a grandfather clause protecting the existing systems.

In numerous states opinions of the attorney general have been rendered to the effect that CATV systems are not public utilities and we cite the following:

Opinion of the Attorney General of Arizona, 12 RR 2094 (1955)

Opinion of the Attorney General of Kentucky, 2 RR 2d 2053 (1964)

Opinion of the Attorney General of Massachusetts, 7 RR 2d 2081 (1966)

Opinion of the Attorney General of Missouri, No. 127 (1964)

Opinion of the Attorney General of Oklahoma, 1 RR 2d 2056 (1963)

Opinion of the Attorney General of Texas, 8 RR 2d 2058 (1966)

Opinion of the Attorney General of Utah, 14 RR 2063 (1956).

Opinion of the Attorney General of Washington, 14 RR 2059 (1954)

In addition in the following judicial decisions the Courts have found CATV systems not to be public utilities:

Community Television Systems of Wyoming, 17 RR 2135 (District Court Opinion).

Television Transmission, Inc. vs. Public Utilities Commission of California, 47 Cal. 2d 82, 301 P. 2d 862.

Cerrache Television Corp. vs. Public Service Commission, 267 N.Y. Supplement 2d 9690.

Greater Fremont, Inc. vs. City of Fremont, 302 F. Supp. 652 (M.D. Ohio, 1968) affirmed sub. nom.

Wonderland Ventures, Inc. vs. City of Sandusky, 423 F. 2d 548.

We believe the following language from the decision by Judge Young in the *Greater Fremont, Inc.* case in 302 F. Supp. 652 is material here:

"A second way in which CATV can be considered is a disseminator of entertainment. In this role CATV can be compared to the theatre, television, radio, newspapers, magazines and music services. Each of these in its role as a media of entertainment helps to lighten the burden of daily routine. While these media vary from 'hot' to 'cold', to use the McLuhanise phrase, they serve exactly the same function, and no distinction should be drawn between these forms of entertainment for regulatory purposes unless there is some real basis for the distinction.

"The third way in which CATV can be considered is as a communicator of news, thoughts, and ideas, similar to a newspaper, television, radio, books, magazines, news wire services, etc. It differs from these only in that it is *always* a secondary source of these items of news, thoughts, and ideas, since it is only repeating what is presented on television. Nonetheless, it is presenting the news, thoughts and ideas that appear on television, and disseminating them to some individuals who could be unable to receive them without the aid of CATV.

"When we consider CATV in this role, we are approaching the areas of freedom of speech and of the press protected by the First Amendment. In this area, the courts must always be alert to prevent improper encroachment by governmental regulations having no real basis in the public interest.

"Finally, we must consider CATV is an economic unit. Unlike water, gas and electric companies where there is great public inconvenience in having numberous concerns serving the same geographical market,

CATV is not a natural monopoly. There is only the inconvenience of having another pair of wires, if that, involved in having an additional CATV company in a geographical market. Thus, the scope of regulation which is necessary in the natural monopolies is not here necessary.

"Likewise, the economic factors which necessitate the regulation of the rates of the natural monopolies are not here present. For the purpose of analyzing the behavior of CATV rates in the market, we shall assume that the radio and television stations will continue to broadcast their signals via air waves, which is not too great an assumption."

We also urge consideration of the language by Justice McAffer in the *Cerracche* case in 267 N.Y. Supp. 2d 609, cited above where the Judge said:

"The business of the petitioner is of recent origin arising from the rapid expansion of the television industry. Patently the picking off-the-air standard broadcasts of commercial television stations and by amplification transmitting the same over wires directly to the household patron is not in any sense telephonic communication. Basically, then the petitioner's business is not subject to the jurisdiction of the commission as the statutes are now written. *Whether such an industry should be regulated is for the legislature and not for the courts.*"

Also again on the subject of freedom of speech and of the press, in the absence of valid statutory regulation we call attention to *Weaver vs. Jordan*, 411 P. 2d 289 being the decision of the California Supreme Court on the constitutionality of the initiated law attempted in California which prohibited pay TV and see also the decision of the United

States Court of Appeals for the Eighth Circuit in *Springfield Television, Inc., et al. vs. the City of Springfield, et al.*, Case No. 1909 decided June 23, 1970 (not yet printed in the advance sheets) in which the Court considered the rights of free speech and other constitutional guarantees involved.

In the *Weaver* decision, the Supreme Court of California made it clear that a telecaster's First Amendment freedoms of speech and press may not constitutionally be made subject to the vote of the electorate. These freedoms extend not only to the right to utter or to print but also to the rights to distribute and receive. The California Court stated at page 299 of 411 P. 2d:

> "Monopoly in the field of communication can best be avoided by permitting the growth of that field of endeavor in directions and through media which will provide the widest possible range and choice of ideas and of expression."

Petitioners here submit that the South Dakota Supreme Court decision for which review is sought, by its requirement that a cable television operator receive a majority vote of the electorate, unconstitutionally restricts Petitioners' freedoms of speech and press.

Finally we urge the Court to consider the decision of the Appellate Court of Illinois Fourth District in *Illinois Broadcasting Company vs. City of Decatur*, 96 Ill. App. 2d 454, 23 N.E. 2d 261, which considered an ordinance quite similar to the one used in Aberdeen, South Dakota, where the Court said:

> "At the time this ordinance was enacted there was no statutory authority which expressly dealt with the

> licensing or franchising of the business of CATV by municipalities. However, during the pendency of this appeal, the following was enacted, being Section 11-42-11 of CH. 24, Ill. Rev. Stat. 1967: 'The corporate authorities of each municipality may license franchise and tax a business of operating a community antenna television system as hereinafter defined' notwithstanding this express grant, and without getting into the question of whether this Section would validate an ordinance otherwise invalid, we are of the opinion that municipalities prior to the passage of this section has implied power in the very first instance to enact the franchise ordinance under attack."

We believe the law is the same in South Dakota as in Illinois and that is that the City has power to enact the ordinance as a part of its regulation of the use of its streets and alleys, but that in the absence of a statute providing for public utility regulation the decision of the Supreme Court of South Dakota took the property of the petitioner, Aberdeen Cable TV Service, Inc., without due process of law and that this Court should grant a Writ of Certiorari to correct the injustice.

We urged the Supreme Court of South Dakota on the Petition for Rehearing that if it was determined to declare the same a public utility that it do it on a prospective basis rather than on an immediate basis along the lines of *Molitor vs. Kaneland Comm. Unit District*, 18 Ill. 2d 11, 163 N.E. 2d 89, 86 ALR 2d 469 and it is urged that if the Court is to declare the existance of a public utility without the aid of the statute that it is a destruction of private rights entitled to protection unless declared on a prospective basis, a result which would surely have occurred if the

legislature were to deal with the subject instead of the Court.

Respectfully submitted,

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APPENDIX 1

STATE OF SOUTH DAKOTA, County of Brown. CIRCUIT COURT. 5th Judicial Circuit.

ABERDEEN CABLE TV SERVICE, INC., WALTER A. BROWN and STACY B. BROWN,

Plaintiffs,

vs.

CITY OF ABERDEEN, SOUTH DAKOTA, a Municipal Corporation, J. CLIFTON HURLBERT, as Mayor and Member of the City Commission of the City of Aberdeen, FRED GERDES, HALE INMAN, AL DONAHUE and BILL COESTER, as Members of the City Commission of the City of Aberdeen, and WINIFRED KRAFT as City Auditor of the City of Aberdeen, and SOUTH DAKOTA TELEVISION, INC.,

Defendants.

IN THE MATTER OF ELECTION CONTEST AS TO THE VALIDITY OF THE SPECIAL ELECTION HELD IN ABERDEEN, SOUTH DAKOTA ON OCTOBER 1, 1968, WHICH SUBMITTED CITY OF ABERDEEN, SOUTH DAKOTA ORDINANCE NO. 1187—AMENDED TO THE ELECTORS OF CITY OF ABERDEEN FOR REJECTION OR APPROVAL.

MEMORANDUM OPINION

The above proceedings are two cases that by agreement of the parties and by Order of the Court have been consolidated for purposes of trial. One Memorandum Opinion will be issued in this matter, but separate "Findings of Fact and Conclusions of Law" and "Judgment" will be made.

The nature of the two proceedings is: An election contest under SDC 45.10; SDC 1960 Supp. 45.10; Chapter 183 of 1968 Session Laws for South Dakota; SDC 1960 Supp. 55.04 and SDC 16.19, and an action for a declaratory judgment under SDC 37.01. At the one and only hearing held in this matter, it was stipulated by and between the parties that the case should be submitted on depositions and briefs. This was satisfactory to the Court.

Generally, it appears that the facts and events constituting these two cases are in narrative form as follows:

The City Commission of Aberdeen, South Dakota, passed an ordinance known as Ordinance No. 1187-amended, granting to Plaintiff, Aberdeen Cable TV Service, Inc., a non-exclusive right to construct and maintain cable TV service for 20 years in the City of Aberdeen. The ordinance was adopted August 12, 1968, published August 13, 1968, and would become effective on the 20th day after publication unless suspended by referendum. On August 30, 1968, a referendum petition purporting to be signed by 5% of the City of Aberdeen electorate voting for governor in the last general election, was filed with the City Auditor of Aberdeen, requesting that the said Ordinance No. 1187-amended be submitted to a vote of the electors of Aberdeen for its approval or rejection. The pe-

tition was in 14 separate sections and contained approximately 529 signatures; it appears that the minimum number of signatures needed was 403; it further appears that the City Commission of Aberdeen acted on the petition on September 9, 1968, and set an election for October 1, 1968, at which time the Aberdeen electorate could reject or approve said Ordinance No. 1187-amended. On October 1, 1968, the election was held and the Aberdeen electorate rejected the ordinance by 2,532 votes to 2,026 votes. Official canvass of the election has been had.

Shortly after the referendum election, Plaintiffs Aberdeen Cable TV Service, Inc., and Walter A. Brown and Stacy B. Brown, all of Aberdeen, started the two lawsuits here in consideration; one for a declaratory judgment and the other to contest the election held on October 1, 1968. The Defendants named were the City of Aberdeen, the Mayor, the Members of the City Commission and the City Auditor of the City of Aberdeen.

Some time after the suits were started, South Dakota Television, Inc., the owner of Station KXAB-TV, located at Aberdeen, South Dakota, moved the Court for intervention as a defendant in the two cases, and the motion to intervene was granted.

On December 2, 1968, a hearing was had before this Court at Aberdeen, South Dakota. The parties and the Court agreed that the two cases should be consolidated and that the case should be decided on the pleadings, depositions and briefs. The depositions have been taken and submitted to the Court. The last brief was submitted to the Court on January 22, 1969. The Court indicated at the time of the hearing on December 2, 1968, that oral argu-

ment would be called for if the Court deemed it necessary. It appears that counsel has briefed the issues so effectively that oral argument will not be necessary.

Reduced to its essence.

Plaintiffs claim the following:

1. That the City of Aberdeen was without jurisdiction to call or hold the election on October 1, 1968, and that such election is a nullity because:

(a) two employees of KXAB-TV committed a fraud upon the plaintiffs, City of Aberdeen, Citizens of Aberdeen and the City Auditor of Aberdeen by submitting to and filing with the City Auditor 11 sections containing 398 signatures which contained false verifications in one or more respects, as follows:

(1) that persons who signed the verifications were not the persons who circulated and secured the signatures;

(2) that the persons who signed the verifications were not acquainted with all the persons whose names are affixed to the sections of the petition;

(3) that persons who signed the verifications, not having observed the signing of the petitions, do not know that each of such persons signed paper personally and added thereto his place of residence and date of signing;

(4) that persons signing the verifications, not being acquainted with all persons who signed, do not know that each and all of said signers are residents and qualified voters of the City of Aberdeen;

(5) that persons who signed the verification, not having observed the signing of the petitions, do not know that each of such persons signed said petition with full knowledge of its contents;

(6) that persons who signed verifications were employees of KXAB-TV, secured the signatures to the petitions during business hours and could not accurately state they received no compensation or promise of compensation for their services in circulating said petitions;

(b) At least 11 sections of the petition were circulated by persons other than the verifiers, all contrary to law, in manner as follows:

(1) Ken McCormick a non-resident of Aberdeen, circulated all or part of one section of petition;

(2) A portion of 1 section was circulated by a girl between the age of 11-15 years;

(3) that several sections of said petition were circulated by employees of KXAB-TV;

(4) that one section of said petition was circulated by 4 different people;

(5) that one section of said petition was brought to the Aberdeen Police Station and left for signatures;

(c) That 336 signatures on said sections of petition contain only the street addresses and they do not show residence as being "Aberdeen" or "Aberdeen, South Dakota."

(d) That on several occasions circulators of the sections misrepresented the contents of said petition by advising signers that the only way to get cable TV in Aberdeen is to have an election.

(e) That the petition was filed on August 30, 1968, but the City Commission of Aberdeen did not set the election within 30 days after filing said petition as required by SDC 45.1011 and that the election was therefore a nullity.

(f) That if Court does not declare referendum petition invalid and the election a nullity, Plaintiffs Walter A. Brown and Stacy B. Brown will be denied certain contractual rights.

Both defendant City of Aberdeen, South Dakota, a Municipal Corporation, et al. and the Intervenor as defendant answered; which answers were general denials in character; both answers called for dismissal of the complaints on the ground that no cause of action existed in favor of the plaintiffs.

In addition to its general denial type of answer, the intervenor in an amended answer and in its brief dated January 17, 1969, advanced the argument that Plaintiff Aberdeen Cable TV Service, Inc. is a public utility and that Ordinance No. 1187-amended is without the breath of life because 1939 SDC 45.1006 has not been complied with. This is an interesting position for the intervenor to assume.

The many facets of this case or these two cases present many opportunities for extensive discussion. The Court does not propose to invade all of the thickets of pos-

sibility here but will instead state its position on points raised, as the Court has come to its conclusions from a perusal of pleadings, briefs, depositions and research in general and does so with a minimum of wordage.

I. The argument that 336 signatures on said petition are invalid because the signers did not put "Aberdeen" or "Aberdeen, South Dakota" after their signatures and place of residence.

This Court believes that this argument is without merit by virtue of the Supreme Court's ruling in State ex-rel Jensen v. Wells, 66 S.D. 236, 278 N.W. 171. In that case our Court said in part: "Plaintiff first contends that, if the signer failed to write either South Dakota or the abbreviation therefor in the residence or business column, the signature cannot be counted. We cannot agree. By signing the petition the signer represents that he is a 'qualified elector of the State of South Dakota' as disclosed by the body of the petition above set out, the first sentence therein states: 'We the undersigned, qualified electors of the State of South Dakota.' It would appear most technical for us after this representation to require that the signer after writing in the post office or residence column such words as Aberdeen, Flandreau, Pierre, Deadwood or Canton be further required to follow such words with the word 'South Dakota,' or the abbreviation therefore * * *."

In the petition now in question we find the wording, "We the undersigned and qualified electors of Aberdeen, South Dakota * * *." This Court holds that it was not a disqualifying act for the signers to neglect to add "Aberdeen, South Dakota" after their

place of residence. This Court therefore holds that the petitions were valid and the number of signers sufficient, as far as failure to add "Aberdeen, South Dakota" after their signatures is concerned.

II. The argument that the petition was invalid because 11 of the 14 sections of the petition had false and fraudulent circulator affidavits attached.

This is a most serious challenge to the validity of the petition under consideration. The Court has examined the 14 sections constituting the petition. Of these 14 sections 2 were verified by Emma Oscarson as circulator and 12 were circulated by Donald L. Fordham as circulator. From the Court's examination of the depositions taken and made a part of this matter, it appears that sections 6, 11 and 12 are fully acceptable and valid in that the circulator personally circulated these sections and all signers on said sections 6, 11 and 12 did sign in the presence of the circulator Donald L. Fordham.

The number of signatures on sections 6, 11 and 12 total 116. These the Court accepts as valid signatures. But as to the remaining sections, there is another story. According to the testimony of the persons who are deposed herein we have general confusion. It appears that sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 13 and 14 were circulated in an unbelievable manner—a 15-year old girl who was a resident of St. Cloud, Minnesota, secured some signatures for section 3; a resident of Bath, South Dakota, circulated part of one section; one petition was left at the Aberdeen Police Station and names secured outside the presence of the

circulator; in fact, Donald L. Fordham and Emma Oscarson frankly admitted that many signatures on the sections they verified as circulators were not secured by them. It appears that Mr. Fordham verified as circulator at large.

The provisions of SDC 1960 Supp. 55.0405, the applicable law on verification of petition by circulators, reads as follows:

"55.0405 Verification of petition by circulators: form. Every person who shall circulate and secure signatures to a petition to initiate or submit to the electors any law under the provisions of section 1, article III, of the Constitution, shall, before filing said petition with the officer in whose office the same is by law required to be filed, make and attach to the petition an affidavit in the following form, which he shall subscribe and swear to before some officer qualified to administer oaths and having an official seal:

'State of South Dakota,
County of .....
ss.

'I, ..., being first duly and solemnly sworn, on my oath state, that I am a qualified voter of the state of South Dakota. That I am acquainted with all the persons whose names are affixed to the above and foregoing paper and know that each one of said persons signed said paper personally and added thereto his place of residence and date of signing. That each and all of said persons are residents and qualified electors of the coun-

ty of ....., State of South Dakota. That each of said persons signed said petition will full knowledge of its contents. That I have received no compensation whatever or promise of compensation for my services in circulating said petition.

.....

Subscribed and sworn to before me this ..... day of ....., 19 .....'"

The requirements of this law are not difficult of comprehension. The requirements are positive, a plain reading of the circulators oath should have warned the circulator of his or her obligation.

The Court believes that State ex rel. Jensen vs. Wells, 66 S.D. 269, 281 N.W. 505, at page 273 is very material here. /2/ which is the material portion reads as follows: "The following is a list of sections which counsel for defendant concede should be rejected: 76, 79, 106, 598, 1082, 1259, 1262, 1274, 1277, 1373, 1385, 1388, 1391 and 1418. These are instances in which a section has been in the hands of more than one circulator. The 674 signers in these parts of the petition are not entitled to be counted."

Let us also consider Morford vs. Pyle, 53 S.D. 356, 220 N.W. 907. Wherein the court said, beginning at page 361-/4, 5/, this:

"This may be true; but it applies to the signers only, and not to the persons who circulated the petitions. It is undoubtedly true that, on the petitions under consideration, there are the names of some 2,500 electors who signed their names to the petition in good faith and added to their names the

data required by the statute; but the verification by the party who circulated the petition is as much an essential of a good and valid referendum petition as the names themselves, and where there is no verification, or the purported verification is false, which amounts to the same thing, the petition cannot be counted. The person who circulates the petition is the agent of the petitioners, and they are bound by his acts. O'Brien v. Pyle (S.D.) 214 N.W. 623; State v. Graves, 90 Ohio St. 311, 107 N.W. 1018."

We must also consider State ex-rel Jensen v. Wells, 66 S.D. 269, at page 274, where the court said:

"/5/ * * * we find that some names in sections 607 and 1250 were not signed in the presence of the circulators. The 55 signers in these two sections must be rejected. Morford v. Pyle, 53 S.D. 356, 220 N.W. 907."

The Court believes that sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 13 and 14 of the petition cannot be considered valid and must therefore be rejected. The total number of signers on the rejected sections is 413. The minimum number of signatures needed on the petition for referendum purposes under the law is 403. Since only 116 signatures on the petition herein are considered valid, the petition was not legally sufficient to be the basis for a referendum election on Ordinance No. 1187-Amended.

III. The argument that the referendum election on Ordinance No. 1187-Amended was invalid because it was called by the City Commission of Aberdeen and not the City Auditor of Aberdeen, South Dakota.

The governing statute in connection with this argument is SDC 1960 Supp. 45.1011, which reads as follows:

"45.1011. Referendum petition filed. The required number of qualified electors residing in any municipality may file within twenty days after the publication of any ordinance or resolution subject to referendum a petition with the auditor or clerk, requiring the submission of any such ordinance or resolution to a vote of the electors of the municipality for its rejection or approval.

"A special election shall be held for the purpose within thirty days after the filing of such petition; except that when such petition is filed within three months prior to the annual municipal election, such ordinance or resolution shall be submitted at such annual election if there is time to give notice thereof."

The Court notes that the latest amendment removes the words "him to submit" from the law. This in effect is a legislative manifestation that elections held pursuant to SDC 1960 Supp. 45.1011 shall be submitted to the electorate by the governing body of the municipality and not by the city auditor or clerk as contended for by the plaintiff herein. This argument is rejected and the Court holds that the law requires that the governing body of the municipality submits ordinances and resolutions to the electorate for its approval or rejection.

IV. The argument that the validity of the petition can be attacked after as well as before the referendum.

The Supreme Court ruled on this point in Klaudt et al. vs. City of Menno et al., 72 S.D. 1, 28 N.W. 2d 876. In that case the court said in part, "This case arose under a statute authorizing the submission of specific questions to a vote of the people at a special election. The statutory requirements for a sufficient petition were conditions precedent to the right to hold such an election. Failure to file a valid petition rendered the election void, and it was immaterial whether the question was raised before or after the election was held. Gooder v. Rudd, supra."

The Court holds that Klaudt et al. v. City of Menno et al. is dispositive of this argument. The validity of the petition in this case could have been attacked before the election or as was the case, attacked after the election.

V. The argument raised by Intervening Defendant South Dakota Television, Inc. that Ordinance No. 1187-Amended is in the nature of franchise to a utility and is not legal because it has not been accepted by the voters as required by SDC 45.1006.

This is a novel attack upon Ordinance No. 1187-Amended. Both sides have exhaustively briefed the proposition. There are no South Dakota cases in point.

The Court is inclined to view that Ordinance No. 1187-Amended is not in the nature of a franchise but rather a non-exclusive right. The Court feels that other TV companies could likewise secure a similar non-exclusive right for cable TV service if the city commission agreed to view such request with fa-

vor. This Court hesitates to hold that Ordinance No. 1187-Amended grants a franchise to the plaintiff.

VI. The argument that the election held on October 1, 1968, was a nullity because the election was not held within 30 days from date of filing petition.

The Court holds that this requirement is more directory in nature than mandatory. The Court believes State ex rel. Pryor v. Axness, et al., 31 S.D. 125, 139 N.W. 791 at page 795 rather indicates the directory character of the time requirement.

I find it regrettable to thwart the will of the electorate who on October 1, 1968, voted by a count of 2,532 to 2,026 to strike out Ordinance No. 1187-Amended; but the failure of the requirements for such action were not met. Recourse to legal action is the American way of final determination. In essence, the will of the majority was thwarted by those who failed to comply with the law, and especially a law that was so plain and obvious—the law for the circulation of petitions for referendum elections.

The Court has considered all the pleadings, files, exhibits, depositions, stipulations, briefs and arguments submitted and made in the matter of these two cases consolidated for purposes of trial, and does hereby render its opinion and decision that:

1. The referendum petition filed with the City Auditor on August 30, 1968, was not a valid petition in that it contained only 116 valid signatures when the minimum required number was 403; of the

total of 529 signatures on said petition, 413 signatures were invalid and rejected because of improper circulator verification as previously more fully explained; because the petition was invalid for reasons previously stated, the election held on October 1, 1968, is declared null and void and set aside and the request of plaintiff for a Declaratory Judgment and for a contest of election are both granted and allowed.

2. The Ordinance in question—Ordinance No. 1187-Amended—is declared by the Court to be in full force and effect.

3. Because a public question is involved, no costs will be taxed.

Counsel for the plaintiff will prepare proposed findings of fact and conclusions of law and proposed judgment in each of these two matters; submitting the same to the Court and at the same time submitting copies to the defendant and to the intervening defendant. Plaintiff will be allowed 10 days from receipt of the Memorandum Opinion within which to submit said instruments to the Court and copies to the defendants. The defendants will be allowed 10 days from the receipt of copies of said instruments within which to make objections or submit their own proposed findings of fact and conclusions of law and proposed judgments.

Dated this 24th day of February, 1969.

By the Court:

SIGARD ANDERSON,
Circuit Court Judge.

APPENDIX 2

10731-r-CSH

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

ABERDEEN CABLE TV SERVICE, INC., WALTER A. BROWN AND STACY B. BROWN,
Plaintiffs and Respondents,

vs.

CITY OF ABERDEEN, SOUTH DAKOTA, A MUNICIPAL CORPORATION, J. CLIFTON HURLBERT, AS MAYOR AND MEMBER OF THE CITY COMMISSION OF THE CITY OF ABERDEEN, FRED GERDES, HALE INMAN, AL DONAHUE AND BILL COESTER, AS MEMBERS OF THE CITY COMMISSION OF THE CITY OF ABERDEEN, AND WINIFRED KRAFT, AS CITY AUDITOR OF THE CITY OF ABERDEEN,
Defendants and Respondents,

AND

SOUTH DAKOTA TELEVISION INC.,
Intervenor Defendant and Appellant.

* * * *

APPEAL FROM THE CIRCUIT COURT OF
BROWN COUNTY, SOUTH DAKOTA
HON. SIGURD ANDERSON, JUDGE
Opinion Filed May 5, 1970.

HANSON, Judge.

On August 12, 1968 the Aberdeen City Commission enacted Ordinance No. 1187-Amended entitled:

> "An ordinance granting to Aberdeen Cable TV Service, Inc. the non-exclusive right to erect, maintain and operate in, under, over, along, across, and upon the present and future streets, lanes, avenues, sidewalks, alleys, bridges, highways and other public places in the City of Aberdeen, South Dakota and subsequent additions thereto, towers, poles, lines, cables, wires, other apparatus and additions thereto, for the purpose of transmission and distribution by cables and/or wires of television signals to enable sale of community television antenna service to the inhabitants of said City and other purposes, for a period of twenty (20) years, regulating the same, and providing for compensation to the City."

The Ordinance was referred to the electors of the City and substantially defeated at the election. The referendum petitions were determined by the trial court to be insufficient and the election void. Nevertheless, the court concluded Aberdeen Cable TV Service, Inc. was not a public utility and Ordinance No. 1187-Amended was in full force and effect as it did not grant a franchise and did not have to be submitted to a vote of the electors. Therefore, the sole issue on appeal is whether the Ordinance required submission to a vote of the electors before it could become effective.

Community antenna television is a relatively new means of television transmission. It is described and explained in a symposium on "Communications" in Vol. 34, No. 2, Law and Contemp. Prob. on p. 238 as follows:

"Cable television, alias community antenna television (CATV), began for the purpose of serving people in communities which did not receive over-the-air television and has become the potential complete telecommunications system. By linking space satelites, radio, television, facsimile, telephone, teletype, telemetry, computers, data storage and retrieval systems, and other communications hardware in a complete cable-to-home communications system, it is possible to place each person in contact with his full information environment and to allow each person to contribute information to the storehouse of knowledge.

"Cable television had its inception in 1949. By mid-1968, approximately 2,000 cable television systems were operating or under construction. These systems were capable of carrying their own programs, in addition to signals received from regular television stations. Initially, cable television served communities lacking television service or receiving a signal of poor quality. An antenna was placed on a mountain or tall tower, and the signal was picked up, amplified, and transmitted via cable to the viewer's home. Later, microwave relay also was used to bring the signal from the point of origination or capture to the distribution point in the community served. At the distribution center, connection is made with coaxial cable or other wire-distribution lines. Usually, the distribution cable is supported by telephone or electric utility poles, the cable television system paying a rental for the use of the poles. In some cases, the cable is laid beneath city streets, an easement being obtained from the city; in other cases it may be neces-

sary for the cable television system to erect poles for the cable. The signals are amplified at the central distribution point, and, depending upon the length of the cable and other conditions, further amplification of the signal may be necessary along the line. The systems now being installed usually are twelve-channel systems. However, twenty-channel systems are technically feasible at slightly greater cost, and some such systems have been installed. The multiple purpose cable can carry simultaneously as many signals as there are channels, using different frequencies.

"At home, the cable is attached directly to the television receiver. The viewer, as with the selection of conventional over-the-air broadcasting channels, turns the dial to select the channel carrying the program desired. More than three and a half million homes in the United States are receiving cable television service."

In this state an abutting property owner in a municipality holds fee title to the center of the street, SDCL 43-16-3, subject and subordinate to an easement or servitude in favor of the public. "When a street is used for any proper street purpose by permission of the city authorities, such use does not constitute an additional servitude, though such use may not have been known when the streets were dedicated, appropriated, or condemned for street purposes, and the abutting fee owner is not entitled to compensation for any damages he may sustain by reason of such use." Kirby v. Citizens' Telephone Co., 17 S.D. 362, 97 N.W. 3. But an unauthorized use of the streets for private purposes is compensable. 39 Am. Jur. 2d, Highways, Streets, and Bridges, § 160, p. 535. In this respect every municipality in this state is expressly authorized

"* * * to regulate or prohibit the erection of poles for telegraph, telephone, or electric wires in the public grounds, streets, or alleys, and the placing of wire thereon, and to require the removal thereof from such places and to require the placing of such wires under ground; and to grant and regulate rights and franchises for such purposes." SDCL 9-35-1.

"The governing body shall grant no franchise to any public utility authorizing it to occupy any of the streets, alleys, or public places of the municipality without submitting the proposition of issuing such franchise to a vote of the electors thereof at a general or special election called for the purpose." SDCL 9-35-3.

In State v. Scougal, 3 S.D. 55, 51 N.W. 858, the court pointed out the term "franchise" means a special privilege conferred by government upon an individual which does not belong to citizens generally by common right. Accordingly, the ordinance granting Aberdeen Cable TV Service, Inc. the right to erect, maintain and operate towers, poles, lines, cables, wires, and other apparatus in, under, over, along, across and upon all the streets, sidewalks, alleys, bridges, and highways in the City of Aberdeen for the transmission and distribution of audio, visual, electronic and electric signals for a period of twenty years is clearly a franchise ordinance as it confers upon a private corporation for profit a right or privilege which does not belong to the citizens of Aberdeen generally by common right. Kornegay v. City of Raleigh, 269 N.C. 155, 152 S.E. 2d 186; 36 Am. Jur. 2d, Franchises, § 1, p. 723.

The public utility commission is given general supervi-

sion of all common carriers in the state, except street railways, SDCL 49-3-4, and for this purpose the term "common carriers" shall be deemed and taken to mean "all corporations, companies, or individuals now owning or operating, or which may hereafter own or operate any railroad, express company, telegraph, or telephone company, in whole or in part, in this state" SDCL 49-3-1. These provisions merely designate the public utilities which are now subject to regulation by the commission. Obviously, all public utilities in this state are not under the control and supervision of the public utilities commission, such as water, gas, and electric companies. Furthermore, all common carriers are public utilities, but all public utilities are not common carriers.

The question of whether or not a given business, industry or service is a public utility "does not depend on legislative definition, but on the nature of the business or service rendered, and an attempt to declare a company or enterprise to be a public utility, where it is inherently not such, is, by virtue of the guaranties of the federal Constitution, void wherever it interferes with private rights of property or contract. So, a legislature cannot by mere fiat or regulatory order convert a private business or enterprise into a public utility, and the question whether or not a particular company or service is a public utility is a judicial one". 73 C.J.S. Public Utilities § 2, p. 993. The term "public utility" is defined in Black's Law Dictionary 4th Ed. as follows:

> "PUBLIC UTILITY. A business or service which is engaged in regularly supplying the public with some commodity or service which is of public conse-

quence and need, such as electricity, gas, water, transportation, or telephone or telegraph service. Gulf States Utilities Co. v. State, Tex. Civ. App., 46 S.W. 2d 1018, 1021. Any agency, instrumentality, business industry or service which is used or conducted in such manner as to affect the community at large, that is which is not limited or restricted to any particular class of the community. State Public Utilities Commission v. Monarch Refrigerating Co., 267 Ill. 528, 108 N.E. 716, Ann. Cas. 1916A, 528. The test for determining if a concern is a public utility is whether it has held itself out as ready, able and willing to serve the public. Humbrid Lumber Co. v. Public Utilities Commission, 39 Idaho 505, 228 P. 271. The term implies a public use of an article, product, or service, carrying with it the duty of the producer or manufacturer, or one attempting to furnish the service, to serve the public and treat all persons alike, without discrimination. Highland Dairy Farms Co. v. Helvetia Milk Condensing Co., 308 Ill. 294, 139 N.E. 418, 420. It is synonymous with 'public use,' and refers to persons or corporations charged with the duty to supply the public with the use of property or facilities owned or furnished by them. Buder v. First Nat. Bank in St. Louis, C.C.A. Mo., 16 F. 2d 990, 992. To constitute a true 'public utility,' the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the legal right to demand that that service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges. Richardson v. Railroad Commission of California, 191

> Cal. 716, 218 P. 418, 420. The devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately, or there must be the acceptance by the utility of public franchises or calling to its aid the police power of the state. Southern Ohio Power Co. v. Public Utilities Commission of Ohio, 110 Ohio St. 246, 143 N.E. 700, 701, 34 A.L.R. 171."

It is now settled that community antenna television is subject to governmental regulation and control in the public interest. The Federal Communications Commission asserted jurisdiction over both cable and microwave CATV by issuing regulations governing the carriage of local television signals, signal duplication, and prohibited cable systems, temporarily, from entering the 100 largest television markets of the nation. The Commission's power and authority to regulate all CATV systems was affirmed in United States v. Southwestern Cable Co., 392 U.S. 157, 88 S. Ct. 1994, 20 L. Ed. 2d 1001. Also the state of Nevada imposed statewide public utility regulation over its cable television systems and its constitutionality was upheld by a three-judge federal court in TV Pix, Inc. v. Taylor, 304 F. Supp. 459. Therefore, it would now appear to be merely a matter of how extensive national, state, and local supervision will eventually be asserted and exercised over cable television programs, service, and rates. For our present purposes it is sufficient that the nature and character of CATV renders it subject to governmental control in the public interest.

We conclude that within the purview of SDCL 9-35-1 and 9-35-3 Abereen Cable TV Service is a public utility. Consequently, franchise Ordinance 1187-Amended not

having been submitted to and approved by the electors of Aberdeen, as required by law, is of no force and effect.

Reversed.

Rentto, Biegelmeier and Homeyer, JJ., concur.

Roberts, P. J., not participating.

APPENDIX 3

ORDINANCE NO. 1187-AMENDED

AN ORDINANCE GRANTING TO ABERDEEN CABLE TV SERVICE, INC. THE NON-EXCLUSIVE RIGHT TO ERECT, MAINTAIN AND OPERATE IN, UNDER, OVER, ALONG, ACROSS, AND UPON THE PRESENT AND FUTURE STREETS, LANES, AVENUES, SIDEWALKS, ALLEYS, BRIDGES, HIGHWAYS AND OTHER PUBLIC PLACES IN THE CITY OF ABERDEEN, SOUTH DAKOTA, AND SUBSEQUENT ADDITIONS THERETO, TOWERS, POLES, LINES, CABLES, WIRES, OTHER APPARATUS AND ADDITIONS THERETO, FOR THE PURPOSE OF TRANSMISSION AND DISTRIBUTION BY CABLES AND/OR WIRES OF TELEVISION SIGNALS TO ENABLE SALE OF COMMUNITY TELEVISION ANTENNA SERVICE TO THE INHABITANTS OF SAID CITY, AND OTHER PURPOSES, FOR A PERIOD OF TWENTY (20) YEARS, REGULATING THE SAME, AND PROVIDING FOR COMPENSATION TO THE CITY

BE IT ORDAINED BY THE CITY OF ABERDEEN, SOUTH DAKOTA.

SECTION I. In consideration of the faithful performance and observance of the conditions and reservations which are hereinafter specified, the non-exclusive right is hereby granted to ABERDEEN CABLE TV SERVICE, INC. and to its successors, assigns or designees, to erect, maintain and operate towers, poles, lines, cables, wires, other apparatus and additions thereto, in, under, over, along, across, and upon the present and future streets,

lanes, avenues, sidewalks, alleys, bridges, highways and other public places in the City of Aberdeen, South Dakota, and subsequent additions thereto, for the purpose of transmission and distribution of audio, visual, electronic and electric signals or impulses and television energy, by cables and/or wires, commonly called a Community Antenna Television System, in accordance with the laws and regulations of the United States of America, and the State of South Dakota, and the Ordinances and regulations of the City of Aberdeen, South Dakota, for a period of twenty (20) years, commencing from and after the adoption of said Ordinance.

SECTION II. ABERDEEN CABLE TV SERVICE, INC. shall install an "all-band" community antenna television system capable of distributing such signals or impulses for up to twelve (12) television channels or their equivalent, said system to be installed and maintained in accordance with the best accepted standards of the community antenna television industry.

SECTION III. ABERDEEN CABLE TV SERVICE, INC. shall furnish Minneapolis-St. Paul signals via microwave from Minneapolis-St. Paul to Aberdeen, and, in addition, Denver signals are microwave from Denver to Aberdeen, as a part of the Community Antenna Television System, and shall be responsible for obtaining, or cooperating with other appropriate parties who seek to obtain, all necessary microwave authorization from the Federal Communications Commission to furnish the same. The system must be operated in accord with all rules, regulations and proposed regulations of the F.C.C. in order to assure the protection of free broadcasting.

SECTION IV. (Deleted as immaterial to the issues.)

SECTION V. Wherever used in this Ordinance, the word "television" shall mean a system for transmission of audio signals and/or visual images by means of electrical impulses.

SECTION VI. There is hereby granted the further non-exclusive right, privilege, and authority to ABERDEEN CABLE TV SERVICE, INC. to lease, rent, or in any other manner obtain the use of towers, poles, lines, cables, and other equipment, and facilities from any and all holders of public licenses and franchises within the corporate limits of the City of Aberdeen, including the Northwestern Bell Telephone Company and the Northwestern Public Service Company, and to use such towers, poles, lines, cables and other equipment and facilities, subject to all existing and future Ordinances and regulations of the City. The poles used by ABERDEEN CABLE TV SERVICE, INC. for its distribution system shall be those erected and maintained by Northwestern Bell Telephone Company and the Northwestern Public Service Company, when and where practicable, providing mutually satisfactory rental agreements can be entered into with said companies. Provided that if ABERDEEN CABLE TV SERVICE, INC. is unable to negotiate satisfactory agreements with respect to the same for the use of existing pole and other facilities, it shall have the right to install its own poles or go underground at locations designated with prior approval of the City as hereinafter set forth. It is the stated intention of the City of Aberdeen that all other holders of public licenses and franchises within the corporate limits of the City, shall cooperate with ABERDEEN CABLE TV SERVICE, INC. to allow its

joint usage of their poles and pole-line facilities whenever possible.

(Balance of section deleted as immaterial.)

SECTION VII. (Deleted as immaterial.)

SECTION VIII. (Eliminated in part as immaterial.)

ABERDEEN CABLE TV SERVICE, INC. shall receive and distribute to its regular subscribers only television and radio signals which are disseminated to the general public without charge by broadcasting stations operating pursuant to authorization granted by the F.C.C., except that ABERDEEN CABLE TV SERVICE, INC. shall have the right to originate signals conveying weather, time and public service information only, for its subscribers, for which no special charge shall be made.

ABERDEEN CABLE TV SERVICE, INC. shall not transmit any commercial information or advertisement except that which is received from a F.C.C. station and merely relayed to its subscribers.

ABERDEEN CABLE TV SERVICE, INC. agrees that if any existing above-ground wires or cables of the Northwestern Public Service Company in combination with Northwestern Bell Telephone Company are placed underground at any future date, that ABERDEEN CABLE TV SERVICE, INC. will likewise place its cables or wires at the same locations underground at the request of the Board of Commissioners of the City of Aberdeen.

SECTIONS IX, X, XI & XII. (Eliminated as immaterial.)

SECTION XIII. During the term of the rights granted

hereunder and commencing at the end of the twelve (12) month period following the institution of service to subscribers, and continuing for further twelve (12) months periods so long as ABERDEEN CABLE TV SERVICE, INC. operates said system, ABERDEEN CABLE TV SERVICE, INC. shall pay to the City annually the sum of Three Thousand Dollars ($3,000.00) compensation for the said franchise. At any time during the said term the City may elect to receive in lieu of said flat compensation payment three percent (3%) of the total annual gross receipts of said CATV system. Gross receipts shall include monthly service charges but shall not include monies received as installation charges and charges and fees for reconnections, inspections, repairs, or modifications of any installation and all state and federal taxes relating thereto. Such payments by ABERDEEN CABLE TV SERVICE, INC. to the City shall be in lieu of any occupation tax, license tax, or similar levy, and shall be paid annually. Nothing herein contained, however, shall in any way relieve ABERDEEN CABLE TV SERVICE, INC. or its assigns or successors from the obligation of paying property taxes to the City of Aberdeen or Brown County, or any other taxes lawfully levied by the State of South Dakota or any other governmental subdivision thereof on the operation of ABERDEEN CABLE TV SERVICE, INC.

ABERDEEN CABLE TV SERVICE, INC. shall file with the City Auditor of Aberdeen within thirty (30) days after the expiration of any twelve (12) month period during the term of the rights granted hereunder, a statement prepared by a Certified Public Accountant showing the gross receipts as defined herein. It shall be the duty of ABERDEEN CABLE TV SERVICE, INC. to pay to the City

within fifteen (15) days after the time for filing such statements, the amount due for the operating year covered by such statement.

SECTION XIV. ABERDEEN CABLE TV SERVICE, INC. shall proceed as soon as possible and within ninety (90) days from the date of this Ordinance with due diligence to obtain all necessary permits and authorizations which are required in the conduct of its business, including utilties, joint use attachment agreements and microwave carrier licenses to be granted by duly constituted regulatory agencies, including the Federal Communications Commission and the Federal Aviation Agency having jurisdiction over the operation of CATV systems, or their associated microwave relay transmission facilities. Further, ABERDEEN CABLE TV SERVICE, INC. shall commence the installation of said system with due diligence and within a reasonable time subsequent to the obtaining of all the aforementioned necessary permits and authorizations, and shall proceed with due diligence to render service to subscribers following the commencement of installation of the system.

All rights of ABERDEEN CABLE TV SERVICE, INC., or its successors or assigns, as set forth herein, shall be subject to termination by formal resolution of the Board of Commissioners, if for reasons other than acts of God, or action or inaction of any federal or other governmental agency, ABERDEEN CABLE TV SERVICE, INC. shall not have commenced to offer service to subscribers within the term and period of two (2) years from and after the date of the adoption of this Ordinance.

SECTION XV. Installations shall be maintained so as

not to interfere with television reception already in existence and ABERDEEN CABLE TV SERVICE, INC. shall carry all commercial and educational signals of stations which have the City of Aberdeen B contour or service area as established by the Federal Communications Commission and which presently includes stations KXAB-TV and KDLO-TV and the U.H.F. Channel 16 allocated for educational television when activated in Aberdeen, subject to the permission of those stations and the rules, regulations and proposed regulations of the Federal Communications Commission.

SECTION XVI. Any sale, assignment or transfer of the rights granted hereunder shall be made only with the prior consent of the Board of Commissioners expressed by resolution. The said consent of the Board of Commissioners may not be arbitrarily refused; provided, however, that the proposed transferee or assignee must show financial responsibility to the satisfaction of the Board of Commissioners and must agree to comply with all the provisions of this Ordinance; and provided, further, that no such consent shall be required for a transfer by trust deed, mortgage, or other hypothecation as a whole, to secure an indebtedness.

SECTIONS XVII & XVIII. (Eliminated as immaterial.)

SECTION XIX. There is hereby reserved to the City every right and power which is required to be herein reserved or provided by any state statute or Ordinance of the City, and ABERDEEN CABLE TV SERVICE, INC., by its acceptance of the rights granted hereunder, agrees to be bound thereby, and to comply with any action or re-

quirement of the City in its exercise of any such right or power. Further, the rights granted hereunder shall not preclude the City from granting to any other person a right to provide similar services in the City of Aberdeen.

SECTIONS XX, XXI & XXII. (Eliminated as immaterial.)

SECTION XXIII. If any section, sentence, clause or phrase of this Ordinance is for any reason held illegal, invalid, unconstitutional or void, all other sections thereof not so held shall be and remain in full force and effect.

_____

Mayor.

ATTEST:

_____

City Auditor.

_____

APPENDIX 4

IN THE SUPREME COURT,

ss.

State of South Dakota.

BE IT REMEMBERED, That at a term of the Supreme Court of the State of South Dakota held at Pierre, State of South Dakota, on May 5, 1970,

Present: Alex Rentto, Charles S. Hanson, Frank Biegelmeier and Fred J. Homeyer; Roberts, P. J., not participating Judges of said Court. The following proceedings were had and the following judgment was entered to-wit:

File No. 10731

IN THE SUPREME COURT

ss.

State of South Dakota

May 5, 1970.

Present: Alex Rentto, Charles S. Hanson, Frank Biegelmeier and Fred J. Homeyer; Roberts, P. J., not participating. Judges of said Court, and the officers thereof:

ABERDEEN CABLE TV SERVICE, INC., WALTER A. BROWN AND STACY B. BROWN,

Plaintiffs and Respondents,

vs.

CITY OF ABERDEEN, SOUTH DAKOTA, A MUNICIPAL CORPORATION, J. CLIFTON HURLBERT, AS MAYOR AND MEMBER OF THE CITY COMMISSION OF THE CITY OF ABERDEEN, FRED GERDES, HALE INMAN, AL DONAHUE AND BILL COESTER, AS MEMBERS OF THE CITY COMMISSION OF THE CITY OF ABERDEEN, AND WINIFRED KRAFT, AS CITY AUDITOR OF THE CITY OF ABERDEEN,

Defendants and Respondents,

and

SOUTH DAKOTA TELEVISION, INC.,

Intervenor Defendant and Appellant.

This cause coming on to be heard on March 17, 1970, at a term of this Court at the Supreme Court room in the City of Pierre, State of South Dakota, upon the merits of the cause and upon oral argument by counsel, and the Court having advised thereon and filed its decision in writing.

IT IS CONSIDERED, ORDERED AND ADJUDGED, That the Judgment of the Circuit Court, within and for Brown County, appealed from herein, be and the same is hereby reversed.

AND IT IS FURTHER ORDERED, That this cause be

and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED, That Appellant have and recover of the Plaintiffs costs and disbursements on this appeal, expended, taxed and allowed at One Hundred Seven & 50/100ths Dollars.

By the Court:

FRANK BIEGELMEIER,
(Acting) Presiding Judge.

Attest:
LYMAN A. MELBY,
Clerk.

By _____
Deputy Clerk.

AFFIDAVIT

IN THE SUPREME COURT,

ss.

State of South Dakota.

I, LYMAN A. MELBY, Clerk of the Supreme Court, within and for the State of South Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete transcript and copy of the JUDGMENT of the Supreme Court of the State of South Dakota, in the above entitled cause, wherein

ABERDEEN CABLE TV SERVICE, INC., et al.,
Plaintiffs and Respondents,

versus

CITY OF ABERDEEN, SOUTH DAKOTA, etc., et al.,
Defendants and Respondents,

and

SOUTH DAKOTA TELEVISION, INC.,
Intervenor Defendant and Appellant.

as the same now remains of record in said Court.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 30th day of June, 1970.

LYMAN A. MELBY,
Clerk.

By MARGARET PULLES,
Deputy Clerk.

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IN THE

Supreme Court of the United States

OCTOBER, 1970 TERM

No. 784

ABERDEEN CABLE TV SERVICE, INC., WALTER A. BROWN AND STACY B. BROWN,

Petitioners,

v.

CITY OF ABERDEEN, SOUTH DAKOTA, A MUNICIPAL CORPORATION, J. CLIFTON HURLBERT, AS MAYOR AND MEMBER OF THE CITY COMMISSION OF THE CITY OF ABERDEEN, FRED GERDES, HALE INMAN, AL DONAHUE AND BILL COESTER, AS MEMBERS OF THE CITY COMMISSION OF THE CITY OF ABERDEEN, WINFRED KRAFT, AS CITY AUDITOR OF THE CITY OF ABERDEEN, SOUTH DAKOTA TELEVISION, INC. AND TV SIGNAL COMPANY OF ABERDEEN,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of South Dakota and the Circuit Court in and for Brown County, Fifth Judicial Circuit, South Dakota

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the South Dakota Circuit Court, 5th Judicial Circuit, is not officially reported but a copy thereof is included as Appendix I to the Petition for Certiorari. The opinion of the South Dakota Supreme Court is reported at 176 N.W. 2d 738.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The question presented for review is whether the Supreme Court of South Dakota, in construing SDC 1939 45.1006 (now found in Chapter 9-35 of the *South Dakota Compiled Laws* of 1967) and particularly the term "public utility" as contained therein, violated Petitioners' rights under the First, Fifth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATION INVOLVED

The pertinent Constitutional provisions, statutes and regulation involved are set forth in the Petition at pp. 3-6.

STATEMENT

On August 12, 1968, the Aberdeen City Commission enacted Ordinance No. 1187-Amended, granting Aberdeen Cable TV Service, Inc. a franchise to use the streets and alleys for the purpose of constructing and operating a CATV system. The Ordinance was referred to the electors of the City and was rejected at public referendum. Shortly after the referendum, Petitioners instituted two law suits in the Circuit Court, 5th Judicial Circuit, of the State of South Dakota seeking a declaratory judgment and contesting the referendum held on Ordinance No. 1187-Amended.

The Circuit Court held that Aberdeen Cable TV Service, Inc. was not a public utility and that Ordinance No. 1187-Amended was in full force and effect as it did not have to be submitted to a vote of the electors pursuant to SDC 1939 45.1006.

On appeal, the sole issue considered by the Supreme Court of South Dakota was whether the Ordinance required submission to a vote of the electors before it could become effective. The Supreme Court reversed the decision of the Circuit Court and held that a CATV system was a public utility and, therefore, that Petitioners were required to submit their ordinance to public referendum in accordance with SDC 1939 45.1006. As Aberdeen Cable TV Service, Inc. had not satisfied the referendum requirement, the Supreme Court of South Dakota held that Ordinance No. 1187-Amended was void and ineffective.

From the South Dakota Supreme Court's judgment, and its subsequent denial of Petitioners' request for rehearing, the Petition for Writ of Certiorari was filed with this Court.

ARGUMENT

I.

PETITIONERS HAVE WAIVED THE FEDERAL QUESTIONS AND SHOULD NOT NOW BE PERMITTED TO SEEK CERTIORARI REVIEW BY THIS COURT

It is essential that a substantial federal question be properly raised in the state court proceedings if the Supreme Court of the United States is to have certiorari

jurisdiction over a state court decision. The federal question must have been presented to the state court with particularity, *Oxley Stove Co. v. Butler County*, 166 U.S. 648, 655 (1897), and at the proper point in the state court proceeding, *Godchaux Co. v. Estoptnal*, 251 U.S. 179, 818 (1919).

Timely raising of the federal question is itself a matter of state procedure; failure to comply therewith has generally proved a bar to Supreme Court review. *In re Lamkin*, 355 U.S. 59 (1957); *see also Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309 (1903). Specifically, it has been held that where a federal question was not raised in trial court as required under state law, but was raised for the first time in a petition for rehearing addressed to the highest court, denial of the petition for rehearing without opinion precluded review on certiorari by the Supreme Court. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Hanson v. Denckla*, 357 U.S. 235, 243-4 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1934); *see also Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 326, 333-4 (1912). To a similar effect, the federal issue will be deemed to have been waived where the litigant failed to list the federal question among the "assignment of errors" in the brief filed with the state supreme court, or to argue that matter in the brief. *Beck v. Washington*, 369 U.S. 541, 553 (1962).

Petitioners herein have failed in every respect to timely raise the supposed federal issues during the state proceedings. The federal questions asserted by Petitioners were neither raised before the Circuit Court nor included in Petitioners' assignment of errors (or brief) to the State Supreme Court on appeal. In fact, contrary to Petitioners' statement that the federal questions were first raised by

the South Dakota Supreme Court in its Opinion[1] and subsequently pursued by Petitioners in petitioning that court for rehearing, it was not until after final judgment and after denial of their petition for rehearing that Petitioners, in their second request for rehearing and for recall of remittitur, first raised before the South Dakota Supreme Court the federal questions now in issue. In view of *State v. Williams*, 173 N.W. 2d 889 (1970) which holds that under South Dakota law federal questions cannot be raised for the first time on appeal [*see also Tri-State Auto Auction v. Ostroot*, 78 N.W. 2d 468 (1956), and *Milbank v. N.D. Tel. Co.*, 159 N.W. 99 (1916)], Petitioners must as a matter of law be deemed to have waived the federal issues and should not now be permitted to invoke this Court's certiorari jurisdiction based upon an afterthought of unsuccessful state court litigation.

II.

NO CONSTITUTIONAL QUESTIONS ARE PRESENTED

Should the Court reject the arguments contained in the preceding section, Respondent respectfully submits that

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[1] The court's only reference to federally protected rights appeared in a single sentence of its opinion where it noted, as a general proposition, that legislative classification of a company as a public utility might, under some circumstances, be rendered void by virtue of the guaranties of the Constitution of the United States. This passing reference was not at all directed to Petitioners' rights or the effect of application of SDC 1939 45.1006 to them, and cannot be considered as having drawn in question the federal issues asserted by Petitioners herein. *See Black v. Cutler Laboratories* 351 U.S. 292, 297-8 (1956).

no substantial federal questions warranting assertion of certiorari jurisdiction are presented by the Petition for Writ of Certiorari.

A. The Supreme Court of South Dakota Legitimately Construed the Term "Public Utility" as Used in SDC 1939 45.1006

Petitioners do not challenge the constitutionality of SDC 1939 45.1006 itself, which requires public election as a condition precedent to issuance to a public utility of a franchise for use of public streets. They challenge instead the South Dakota Supreme Court's construction of the term "public utility" as employed in that statute, and argue that if CATV in South Dakota is to be treated as a public utility, therefore subject to the election requirement of SDC 1939 45.1006, this must be accomplished by legislative act, not judicial decision.

It is well recognized that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislature, has said." *United States v. American Trucking Associations*, 310 U.S. 534, 544 (1940).

The law concerning state regulation of public utilities is in accord. The question of whether a particular company or service is a public utility does not depend upon legislative definition, but on the nature of the business or service rendered. *State Public Utility Commission v. Monarch Refrigerating Company*, 108 N.E. 716 (1915). The determination of public utility status cannot be accomplished by mere legislative fiat or regulatory order,

Clear Creek Oil and Gas Co. v. Ft. Smith Spelter Co., 230 S.W. 897 (1921); *Inland Empire Rural Electrification v. Department of Public Service of Washington*, 92 P.2d 258 (1939); it is instead a judicial question which must be determined by a court of competent jurisdiction. *Natatorium Co. v. Erb*, 200 P.348, 350 (1921); *Clarksburg Light and Heat Co. v. Public Service Commission*, 100 S.E. 551, 553 (1919).

Petitioners distort the matter by stating that the South Dakota Supreme Court has declared, *"although no statutory determination had been made by the South Dakota Legislature*, that a CATV system is a public utility requiring a public utility election under SDC 1939 45.1006 . . . ." (Emphasis added) The election requirement of SDC 1939 45.1006 is solely a creation of the South Dakota Legislature, not the State Supreme Court. In determining that Petitioners were a "public utility" under the terms of that statute, and therefore subject to the election requirement, the South Dakota Supreme Court sought merely to interpret the applicability to CATV of an existing law – not to declare new public utility regulation.

The fact that CATV was not expressly recognized as a public utility at the time of enactment of the statute does not prevent the South Dakota Court from holding that CATV systems, including Petitioners, were subject at all times to the statute's requirements. Indeed, the absence of any enumeration in the statute of what businesses or services constitute public utilities, or what public utilities are covered thereby, imposes upon the judiciary the responsibility for construction of the term and determination of whether CATV is a public utility subject to the requirements of the statute. For, "if Congress [the legislature] has made a choice of language which thoroughly

brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislature." *Barr v. United States*, 324 U.S. 83, 90 (1945); *see also Amity Fabrics v. United States*, 305 F.2d 4, 9 (Cust. Ct., 2d Div. 1969). [2]

Finally, although other state courts may have held that CATV is not, under the laws of those states, a public utility, the Supreme Court of South Dakota was not bound to follow those cases in determining whether CATV was, *within the meaning of SDC 1939 45.1006*, a "public utility." Nevertheless, the actual decision of the State Court is unimportant for purposes of determining certiorari jurisdiction; what is significant is the question whether the court had the power to construe the term of the statute and whether its construction thereof violated Petitioners' constitutionally protected rights. We believe that the foregoing demonstrates that the South Dakota court was entitled – indeed obliged – to construe the term "public utility," as employed in SDC 1939 45.1006, and that the court acted well within its powers in holding that Petitioners were subject to the election requirement of that statute.

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[2] *See Browder v. United States*, 312 U.S. 335, 339-340 (1941).

B. The South Dakota Supreme Court's Decision Holding Petitioners Subject to the Requirements of SDC 1939 45.1006 Did Not Infringe Upon Petitioners' Rights Under the First Amendment

If Petitioners' grievance be that their First Amendment rights are, by virtue of their being made subject to SDC 1939 45.1006, unconstitutionally restricted, the Petitioners' attack here is misplaced. The requirement that public utilities submit to public referendum is a matter of statute; the state court merely sought to determine whether the Legislature intended that Petitioners be subject to that requirement. We demonstrate that the South Dakota Supreme Court's construction of "public utility" as applicable to Petitioners does not result in any unreasonable restraint on the exercise of Petitioners' First Amendment rights.

Although governmental restrictions imposed upon the exercise of free speech for the purpose of suppressing views and opinions clearly contravene the First Amendment, reasonable limitations directed to the preservation of a community interest are constitutional. *See, e.g., Feiner v. New York*, 340 U.S. 315 (1951); *Kovacs v. Cooper*, 336 U.S. 77 (1949); and *Cox v. New Hampshire*, 312 U.S. 569 (1941), all upholding a municipality's right to condition, or even restrict, access to the streets for exercise of First Amendment rights where a community interest would otherwise be jeopardized. A similar community interest supports the legitimacy of public utility regulation. The constitutionality of such regulation has uniformly been upheld on the ground that state regulation of public utilities, and their use and control of scarce resources indispensable to the public, constitutes

reasonable exercise of the police power of the state in furtherance of the general health and welfare. *See, e.g., State ex rel Utilities Commission v. Lumbee Electric Membership Corp.*, 166 S.E.2d 663 (1969); *Commonwealth Tel. Co. v. Carley*, 213 N.W. 469 (1927); *Motor Transit Co. v. Railroad Comm. of Calif.*, 209 P. 586 (1922); *State v. Holm*, 64 N.W. 989 (1917).

The regulation of public utilities' (CATV's) use of the scarce resource of public streets here is designed to protect the community from the disruptive effects which unrestrained and excessive construction of public utility facilities (including CATV distribution facilities) may have. The regulation here is, in many respects, analagous to the regulation upheld by this Court in *National Broadcasting Company v. United States*, 319 U.S. 190 (1943), where rules of the Federal Communications Commission requiring broadcasters to secure a license as a condition to use of the airwaves were held reasonable restrictions on access not in violation of First Amendment rights. Here, as there, no restriction is imposed upon actual exercise of the right; rather, reasonable conditions have been imposed on access to the indispensable resource to assure that the community at large is not prejudiced by the unrestrained exhaustion of that scarce public resource. Indeed, as Justice Frankfurter noted in speaking for the Court, such regulation does not hinder, but rather ultimately fosters the exercise of First Amendment rights by providing for the orderly use of scarce public resources upon which the exercise of these rights depends. 319 U.S. at 226-7. Viewed in this light, Petitioner's argument of First Amendment infringement is meritless and should be rejected by this Court.

C. Application of SDC 1939 45.1006 to Petitioners Did Not Violate Their Fifth Amendment Rights

Petitioners further contend that, should the Supreme Court of South Dakota be empowered to construe the meaning of "public utility" as including CATV, it should rule prospectively, for application of the election requirement of SDC 1939 45.1006 to Petitioners would jeopardize their business investments and thereby infringe upon property rights protected under the Fifth Amendment.

Initially, we note that application of SDC 1939 45.1006 to Petitioners does not constitute an unlawful taking of property under the Fifth Amendment. Petitioners are required by SDC 1939 45.1006 merely to obtain voter approval of the Ordinance granted to them by the City of Aberdeen; upon having done so, Petitioners will be free to commence CATV services and their business investment will remain secure.

Moreover, while it is generally thought that legislatures should not engage in retroactive regulation, statutory construction by the courts is of a different nature. The legislature, in enacting a statute, creates new law; retroactive regulation might, in some instances, violate the "fairness" principles of the Fifth Amendment. Courts, however, do not engage in the creation of new law but, rather, the construction of existing law.

"Old laws apply to changed situations. The reach of the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms. While a statute speaks from its enactment, even a ciminal statute embraces everything which subsequently falls within

its scope." *Browder v. United States*, 312 U.S. 335, 339-340 (1941).

Thus, SDC 1939 45.1006 has been in effect throughout the course of all events relevant herein. Once the Court construed CATV to be in the nature of a public utility, Petitioners must be viewed as having been a public utility throughout the course of these events and, therefore, subject to the public referendum requirement. There is no constitutional right to the grandfather rights which Petitioners seek, and there is no constitutional infringement when a court merely applies to a party a rule which has been in effect at all relevant times, but to which the party contends he was not subject.

D. The Supreme Court of South Dakota Rendered Its Decision on an Independent Non-Federal Ground

This Court has uniformly held that it will not review a state court judgment based upon an adequate and independent non-federal ground, even when a federal question is involved and is perhaps wrongly decided. *Murdock v. Memphis*, 20 Wall. 590, 636 (1875); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935). Thus, where the federal question is discussed only by passing reference or in certain broad statements in the state supreme court's opinion which are not essential to the court's judgment on state grounds, this Court has in the past declined jurisdiction [*see*, *Black v. Cutler Laboratories*, 351 U.S. 292, 297-298 (1956); *Herb v. Pitcairn*, 324 U.S. 117, 125, 126 (1945)], stating "we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds. *Herb v. Pitcairn, supra; Williams v.*

Kaiser, 323 U.S. 471, 477." *Black v. Cutler Laboratories*, 351 U.S. 292, 297-298 (1956).

It is apparent that no federal questions were timely raised before or considered by the Supreme Court of South Dakota, and that the court rendered its opinion based upon adequate independent non-federal grounds. Indeed, the court did nothing more than determine, on the basis of South Dakota law, the applicability of a state statute to Petitioners, a construction not involving federal laws or affecting federally protected rights. As no federal rights were adjudicated by the court, and as the court was entitled to consider as waived any federal questions presented by Petitioners in their request for stay, we respectfully submit that this Court should consider itself to lack jurisdiction to review the judgment of the South Dakota Supreme Court on certiorari.

CONCLUSION

Petitioners have failed to satisfy the jurisdictional requirement of timely drawing in question the federal issues upon which they urge this Court to base certiorari jurisdiction. Moreover, Petitioners have not presented any compelling arguments demonstrating the existence of federal questions or the need for consideration of this matter by this Court. Accordingly, Respondent TV Signal Company of Aberdeen respectfully submits that the Petition for Certiorari should be denied.

Respectfully submitted,

ROGER E. ZYLSTRA
BURT A. BRAVERMAN
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D. C. 20006
Attorneys for Respondent
TV Signal Company of Aberdeen

October 30, 1970